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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY AND THE
LAWRENCE COUNTY COMMISSIONERS, *Appellants*,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1, *Appellee*.

On Appeal From The Supreme Court
Of The State Of South Dakota

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Supremacy Clause of the United States Constitution voids a South Dakota statute which alters the scheme of distribution of federal funds to units of local government mandated by the Payments in Lieu of Taxes Act.

2. Whether the Supreme Court of South Dakota committed error in failing to properly analyze congressional purpose and intent and in excluding reference to legislative history when it upheld the South Dakota statute challenged as unconstitutional under the Supremacy Clause.

PARTIES TO THE PROCEEDINGS BELOW

Lead-Deadwood School District No. 40-1 was the plaintiff in the trial court and the appellant in the Supreme Court of South Dakota.

Lawrence County and the Lawrence County Commissioners were defendants in the trial court and appellees in the Supreme Court of South Dakota.

The Attorney General for the State of South Dakota was served in the proceedings below but did not appear. Pursuant to Rule 28.4(c) of the Rules of this Court, Appellants state that 28 U.S.C. § 2403(b) may be applicable.

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LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1, *Appellee*.

On Appeal From The Supreme Court Of The State Of South Dakota

JURISDICTIONAL STATEMENT

Lawrence County and the Lawrence County Commissioners appeal to this Court and respectfully pray the Court reverse the decision of the Supreme Court of the State of South Dakota and reinstate the findings, conclusions and judgment of the trial court.

OPINIONS BELOW

The findings of fact, conclusions of law and judgment entered by the trial court dismissing Lead-Deadwood School District's complaint for *writ of mandamus* and granting Lawrence County relief on its counterclaim, declaring S.D. Codified Laws § 5-11-6 (1981) unconstitutional for being in conflict with the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 1601-07 (Supp. 1981), is not reported. The findings, conclusions and judgment appear in Appendix B *infra* pp. 8a-11a.

The majority opinion of the South Dakota Supreme Court reversing the trial court is reported at ___ S.D. ___, 334

N.W.2d 24 (1983) and appears in Appendix A *infra* p. 1a. The dissenting opinion appears in Appendix A *infra* p. 5a.

JURISDICTION

Appellants Lawrence County and the Lawrence County Commissioners appeal from a decision of the South Dakota Supreme Court in an action commenced by the Lead-Deadwood School District for *writ of mandamus*. The trial court denied Lead-Deadwood School District's prayer for *mandamus* and found for Lawrence County and the Lawrence County Commissioners on their counterclaim declaring, *inter alia*, that the South Dakota statute at issue was void under the Supremacy Clause of the United States and South Dakota Constitutions for conflicting with federal law. On appeal, the South Dakota Supreme Court reversed and ordered that a *writ of mandamus* issue, holding that the South Dakota statute at issue was not in conflict with federal law and therefore not void under the Supremacy Clause.

The decision of the South Dakota Supreme Court was entered on May 18, 1983 and is final. There have been no petitions or orders regarding rehearing. Lawrence County and the Lawrence County Commissioners filed their Notice of Appeal on July 22, 1983, asserting 28 U.S.C. § 1257(2) as the grounds for appellate jurisdiction in this Court on account of the South Dakota Supreme Court's decision sustaining the validity of the South Dakota statute challenged on federal constitutional grounds. Appendix C *infra* p. 13a. *See Xerox Corporation v. County of Harris*, ___ U.S. ___, 103 S.Ct. 523, 525-26 (1982); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 605 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Section One of the Payments In Lieu Of Taxes Act,[1] 31 U.S.C. § 1601, provides:[2]

> Effective for fiscal years beginning on and after October 1, 1976, the Secretary is authorized and directed to make payments on a fiscal year basis to each unit of local government in which entitlement lands (as defined in section 1606 of this title) are located. Such payments may be used by such unit for any governmental purpose. The amount of such payments shall be computed as provided in section 1602 of this title.

* * *

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[1] Selected excerpts of the Committee reports and congressional debates with regard to the consideration and passage of the Payments In Lieu Of Taxes Act appear in Appendix D *infra* pp. 14a-31a.

[2] Recodified at 31 U.S.C. § 6902(a). The entire Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 1601-07, was recodified in 31 U.S.C. §§ 6901-06 without substantive change by Pub.L. 97-258, 96 Stat. 877 (Sept. 13, 1982). *See* H.R.Rep. No. 651, 97th Cong. 2d Sess. 1, *reprinted in* 1982 U.S.Code Cong. & Ad. News 1895. References throughout the Statement of the Case and Reasons for Plenary Review will be to 31 U.S.C. §§ 1601-07. In response to a decision from the Sixth Circuit, Congress amended the Payments In Lieu Of Taxes Act to add a new section, 31 U.S.C. § 6907, on July 15, 1983. *See infra* note 19 and Appendix E. The President signed the amendment into law on July 30, 1983. Pub.L. 98-63; 129 Cong. Rec. D1095 (daily ed. August 1, 1983).

Section Six of the Payments In Lieu Of Taxes Act, 31 U.S.C. § 1606, provides, in pertinent part:[3]

> As used in this chapter, the term—
>
> * * *
>
> (c) "unit of local government" means a county, parish, township, municipality, borough existing in the State of Alaska on October 20, 1976, or other unit of government below the State which is a unit of general government as determined by the Secretary . . .
>
> * * *

43 C.F.R. § 1881.0-5 provides, in pertinent part:

> (b)(2) The term "unit of general government" excludes single purpose or special purpose units of local government such as school districts or water districts.
>
> * * *

Section Three of the Payments In Lieu Of Taxes Act, 31 U.S.C. § 1603, provides, in pertinent part:[4]

> (a) In the case of any land or interest therein, acquired by the United States (i) for the Redwood National Park pursuant to the Act of October 2, 1968 (82 Stat. 931) or (ii) acquired for addition to the National Park System or National Forest Wilderness Areas after December 31, 1970, which was subject to local real property taxes within the five years preceding such acquisition, the Secretary is authorized and directed to make payments to counties within the jurisdiction of which such lands or interests therein are located, in addition to payments under section

[3] Recodified at 31 U.S.C. § 6901(2). *See supra* note 2. This section has also been amended to further define units of general government, to be determined by the Secretary of the Interior, to include those units which provide certain governmental services. *See infra* note 20 and Appendix E p. 32a.

[4] Recodified at 31 U.S.C. § 6904. *See supra* note 2.

> 1601 of this title. The counties, under guidelines established by the Secretary, shall distribute the payments on a proportional basis to those units of local government and affected school districts which have incurred losses of real property taxes due to the acquisition of lands or interests therein for addition to either such system . . .
>
> * * *

S.D. Codified Laws § 5-11-6 (1981) provides:

> The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed.

STATEMENT OF THE CASE[5]

On February 15, 1982, Lead-Deadwood School District No. 40-1 (the "School District") filed its complaint for *writ of mandamus* in the Circuit Court for the Eighth Judicial Circuit of South Dakota. The School District sought to have Lawrence County and the Lawrence County Commissioners (collectively the "County") ordered to distribute to the School District funds received by the County from the United States government under Section One of the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 1601-07 (Supp. 1981) (the "Act").[6]

The alleged authority for *mandamus* and the requested distribution to the School District was S.D. Codified Laws ("S.D.C.L.") § 5-11-6, which directed that all federal payments in lieu of taxes, *i.e.*, payments under the Act, be distributed in the same manner as state taxes. Under South Dakota law, the school districts in Lawrence County, including Lead-Dead-

[5] The facts are not in dispute and are based on the opinion below and a stipulation of facts submitted to the trial court.

[6] *See supra* note 2. Section One of the Act, 31 U.S.C. § 1601, provides for payments to counties and other units of local government that have certain federal tax-exempt lands within their boundaries to reimburse those units of local government for lost tax revenues and the costs of providing services for those federal lands. *See infra* p. 11.

wood School District, would have received sixty percent of the Section One payments made by the federal government to the County. *See infra* Appendix A p. 2a, Appendix B p. 10a.

The County answered the complaint and counterclaimed for a declaration that S.D.C.L. § 5-11-6 was in direct conflict with the terms and purposes of the Act so as to be declared void under the Supremacy Clause of the United States Constitution.[7] Section One of the Act provides that the payments to the units of local government may be used for *any* governmental purpose. 31 U.S.C. § 1601. The County argued that, consistent with congressional purpose and the terms of the Act itself, Congress granted the County, as a unit of local government, absolute discretion in determining how to expend the payments it received under Section One of the Act as compensation for the tax immunity of federal lands within its boundaries. The County further argued that the State of South Dakota could not direct any portion of the County's Section One funds to school districts nor any other entity in South Dakota, which were not units of local or general government as defined in the Act and regulations promulgated thereunder, and that the state could not impose any conditions on the County's exercise of its discretion under the Act.

The matter was submitted to the trial court on a stipulation of facts. On September 27, 1982, the trial court entered judgment for the County and against the School District, finding that S.D.C.L. § 5-11-6 stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Act and as such was unconstitutional and void under the Supremacy Clause of both the United States and South Dakota Constitutions. Appendix B *infra* p. 10a.[8]

[7] The County also sought a declaration that the statute was unconstitutional under the Supremacy Clause of South Dakota's Constitution, Art. VI, § 26.

[8] The trial court also held that the County was permitted to use all the payments received from the federal government under the Act for any lawful purpose without regard to S.D.C.L. § 5-11-6. *Id.* at p. 11a. There was no issue presented as to South Dakota's power to restrict the use of any payments in lieu of *state* taxes made by the *state* government to the County.

On October 18, 1982, the School District appealed the trial court's judgment to the South Dakota Supreme Court. On May 18, 1983, the South Dakota Supreme Court issued its opinion reversing the trial court. Appendix A *infra* p. 1a. The court directed that the cause be remanded and that a *writ of mandamus* issue ordering the County to pay over the federal payments received by the County under the Act to the School District in accordance with S.D.C.L. § 5-11-6. *Id.*[8a] The South Dakota Supreme Court did not examine the Act's legislative history or the Act as a whole. The court nevertheless found that S.D.C.L. § 5-11-6 was in harmony with the Act and therefore not an obstacle to the fulfillment of the Act's purposes. *Id.* Two justices of the South Dakota Supreme Court dissented, aruging that S.D.C.L. § 5-11-6 undermined the accomplishment and execution of the full purposes and objectives of Congress by earmarking funds for school districts, contrary to the terms of the Act, the congressional grant of discretion to the County, and the Act's legislative history. *Id.* at p. 5a. The dissent concluded that the trial court's decision should have been affirmed.

The constitutionality of S.D.C.L. § 5-11-6 was initially challenged by the County in the United States District Court for the District of South Dakota well before the School District filed its complaint in state court. In *Lawrence County* v. *State of South Dakota*, 513 F.Supp. 1040 (D.S.D. 1981), *vacated on other grounds*, 668 F.2d 27 (8th Cir. 1982), the district court found that the total discretion given counties under Section One of the Act was abridged by S.D.C.L. § 5-11-6 and declared the state statute void under the Supremacy Clause. *Id.*, 513 F.Supp. at 1043. The United States Court of Appeals for the Eighth Circuit vacated the decision on the grounds that the district court was without jurisdiction to render the declaratory relief because the constitutional challenge to the state stat-

[8a] As of this date, the *writ of mandamus* has not issued.

ute was only defensively raising a federal question and was inadequate support, under the law of the Eighth Circuit, for federal question jurisdiction under 28 U.S.C. § 1331. *Id.*, 668 F.2d at 28, 31.[9] The School District's *mandamus* action was filed in state court three weeks subsequent to the Eighth Circuit's decision.

REASONS FOR PLENARY REVIEW

1. Introduction.

This appeal concerns the constitutionality of a state statute which conflicts with federal law and which purports to substitute a state's judgment for that of Congress. The Payments In Lieu Of Taxes Act provides a comprehensive scheme for minimum payments by the federal government to counties and other units of local government to compensate them for the tax immunity of federal lands within their boundaries. *See infra* p. 11 and Appendix D pp. 14a-23a. The payments under Section One of the Act were intended by Congress to be used by the local governments for any governmental purpose because these local governments were deprived of tax revenues and at the same time were required to provide a variety of services for the maintenance of federal lands. *Id.* Restrictions on the use of these funds were therefore deemed improper. *Id.*

Section One payments are supplemented by additional payments to units of local government under Section Three of the Act for lost revenues due to federal acquisitions of park and wilderness lands which were taken off the tax rolls after 1970. *Id.* pp. 24-25. Section Three payments are paid for only five

[9] Notwithstanding the Eighth Circuit's decision vacating the district court's opinion on jurisdictional grounds, the reasoning in the district court's opinion remains persuasive. Indeed, a district court in Arkansas followed it in finding that an Arkansas statute, similar to S.D.C.L. § 5-11-6 in apportioning payments under the Act, was void under the Supremacy Clause. Altus Denning School District No. 30, et al. v. Franklin County, et al., ___ F.Supp. ___, Civil No. 82-2029 (W.D.Ark. June 1, 1983).

years and provide additional compensation for the sudden loss of tax revenues when federal lands are acquired and taken off the tax rolls. *Id.* Section Three payments, unlike Section One payments, are to be distributed not in the local government's discretion, but to counties and affected school districts according to guidelines of the Secretary of the Interior. *Id.*

South Dakota has passed legislation which changes this federal scheme. South Dakota law would require that all federal payments under the Act, including Section One payments, be distributed in the same manner as regular tax proceeds and not, as the Act directs, to the units of local government to be spent in their discretion. *See infra* p. 14. As a result, over sixty percent of the payments under the Act would go directly to school districts in the County. This scheme not only conflicts directly with the Act, but frustrates both the express and implied purposes of the Act by substituting the state's judgment for that of Congress. *Id.* Congress recognized that the special costs to units of local government of providing services for federal lands were unique. *See infra* Appendix D. Congress also found that other statutes which provide payments for federal lands directly to the state governments oftentimes did not result in any compensation going to the counties or were restricted to use for roads or schools and did not compensate the local governments for the special costs of maintaining federal lands. *Id.* and *see infra* p. 23. Congress therefore determined that payments under the Act should go *directly* to the units of local government and not be earmarked for any special purpose and that the local governments would have absolute discretion in determining where to spend the funds they receive under Section One of the Act.[10]

[10] Congress' recent amendment to the Act adding 31 U.S.C. § 6907 strengthens this conclusion. *See infra* Appendix E. State legislation may only direct payments under the Act to other units of local government which provide *general* governmental services, which units do *not* include special purpose districts such as school districts. *Id.* and *see infra* notes 21, 28 and 33.

The Supremacy Clause of the United States Constitution voids state laws which are in conflict with the terms or purposes of federal law. The South Dakota statute at issue conflicts both with the express terms of the Act as well as its purposes and congressional intent. First, the federal government's authority to regulate public lands is absolute and any federal statute or regulation dealing with public lands preempts state legislation on the subject. *See infra* p. 16.

Second, the Act's primary and overriding purpose is to reimburse units of *local* government both for the loss of their tax revenues and the special costs of providing services for these tax-exempt lands. *Id.* It is of the utmost significance that Congress did not reimburse the *state* governments or otherwise involve them in the scheme of payments. Nowhere does the Act authorize the states to determine the governmental purposes for which a unit of local government can expend its Section One receipts. Indeed, the legislative history of the Act leaves no doubt that—largely because of the inequities of distributions from state governments under other statutes—Congress vested absolute discretion in the units of local government to determine which of their governmental purposes would be most appropriately served by the expenditure of their Section One receipts due to the unique costs of services required by the presence of federal lands within their boundaries. *Id.* South Dakota can neither defeat nor alter this federal plan by legislation.[11]

Third, any vestigial interest the state may have in compensating school districts is already provided for in Section Three of the Act. *See infra* pp. 24-25. Clearly, had Congress

[11] Under the recent amendment adding 31 U.S.C. § 6907, the states are authorized only to redistribute Section One payments among smaller units of local government in proportion to the amount of tax-exempt lands within their respective boundaries. *See infra* Appendix E. Accordingly, state legislation, such as S.D.C.L. § 5-11-6, cannot redistribute payments to entities other than units of local government and not in proportion to the amounts of federal lands within the units' boundaries. *See infra* note 33.

wanted Section One payments to go directly to school districts, Congress would have expressly stated it in Section One as it did in Section Three. This conclusion is buttressed by the fact that school districts are expressly excluded from the definition encompassing units of local government under the Act and the Act's implementing regulations so as to be ineligible to receive Section One payments directly. *Id.*[12]

The South Dakota Supreme Court therefore committed a substantial error in its parochial review of S.D.C.L. § 5-11-6 and the constitutional issues when it upheld the South Dakota statute challenged under the Supremacy Clause. *See infra* p. 25. The crux of the court's error was its failure to examine the Act in the terms of congressional purpose which is clearly stated both in the Act and in the Act's legislative history. *Id.* This error was pointed out in the dissent which found, after examining the Act's legislative history and determining congressional purpose, that the South Dakota statute was void under the Supremacy Clause. *Id.* The South Dakota Supreme Court's failure to preserve the supremacy of federal law not only disrupts the distribution of all of the payments under the Act in South Dakota but threatens the entire federal program distributing $100 million annually to over a thousand local governments in forty states. *See infra* p. 30.

For these reasons and those presented below, Appellants submit that the South Dakota Supreme Court's decision should be reversed and the decision of the trial court reinstated.

2. Federal Payments In Lieu Of Taxes.

On October 10, 1976, Congress passed the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 1601-07,[13] which provides for pay-

[12] Under the recent amendment to 31 U.S.C. § 6901(2), Congress further defined units of local government in terms of providers of *general* governmental services. Appendix E *infra* p. 32a. School districts do not provide such *general* services. *Id.* and *see* 43 C.F.R. § 1881.0-5.

[13] *See supra* note 2.

ments by the federal government to units of local government within the states which have certain federal tax-exempt lands within their boundaries.[14] S.Rep. No. 1262, 94th Cong. 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5968 ("S.Rep. No. 1262"); H.R.Rep. No. 1106, 94th Cong. 2d Sess., 4-5 (1976) ("H.R.Rep. No. 1106").[15] These federal lands, known as "entitlement lands," were determined by Congress to have adversely affected the tax base of the various local governments where the lands are located.[16] *Id.* The recommendation of the Public Land Law Review Commission was that certain federal lands must be preserved so that they may be used and enjoyed by all Americans and that the United States was obligated to spread the burden of this policy among the public at large so it would not be borne by those localities where the federal lands are located.[17] The Act translated that basic principle into law by "recogniz[ing] the burden imposed by the tax

[14] Approximately one thousand counties in forty states have 761 million acres of federally owned and tax-exempt lands within their boundaries and receive payments under the Act. S.Rep. No. 1262 at 6. These payments approach $100 million annually. Department of Interior, *Payments In Lieu Of Taxes*, fiscal year 1982. Payments made to state and local governments under certain revenue sharing acts are subtracted out from the Section One payments. 31 U.S.C. § 1604. *See infra* p. 14.

[15] Selected excerpts of these reports appear *infra* in Appendix D p. 14a.

[16] Entitlemant lands include those lands that are: (1) in the national park or national forest systems; (2) administered by the Bureau of Land Management; (3) dedicated to federal water resource projects; (4) used by the Army for mobilization and reserve training; (5) dredge disposal areas; or (6) in the vicinity of Purgatory River and Pinyon Canyons, Colorado. 31 U.S.C. § 1606(a). Lands excluded from the definition, and for which no payments are made under the Act, include some 60 million acres administered by the Departments of Defense, Transportation and other agencies. S.Rep. No. 1262 at 14, n. 15.

[17] Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and the Congress by the Public Land Law Review Commission* (Washington, D.C. 1970), at 236 *quoted in* S.Rep. No. 1262 at 6.

immunity of Federal lands [and] providing minimum federal payments to units of local government within the boundaries of which these lands lie." S.Rep. No. 1262 at 6. One of Congress' overriding concerns was to provide compensation to the local governments for the costs to the local governments of providing police, fire and other services for maintaining the federal lands which costs were compounded by the fact that the lands were tax-exempt or produced inadequate revenues. *See infra* p. 23.[18]

A "unit of local government" is defined to include counties, parishes, townships,[19] municipalities, boroughs, or other unit of government below the state which is a unit of general government as determined by the Secretary of the Interior. 31 U.S.C. § 1606(c).[20] Interior's regulations provide that special

[18] The Act employs a formula for computing payments to a unit of local government based on the total acreage of entitlement lands within its boundaries limited by a *per capita* population factor. 31 U.S.C. § 1602. The County received approximately $400,000 in payments under the Act for 1979-1981. *See infra* Appendix A p. 1a and *infra* p. 30.

[19] The Secretary of the Interior originally determined that some townships were not eligible to receive payments under the Act. 43 C.F.R. § 1881.0-5 (1980). Six townships in Michigan challenged the regulation and were determined to be proper recipients of Section One payments. Mead Township v. Andrus, 695 F.2d 1006 (6th Cir. 1982). Partially in response to this decision, Congress added 31 U.S.C. § 6907 which allows states to redistribute payments under the Act to smaller units of general government, such as townships, but upholds the Secretary of the Interior's authority to determine which unit of local government would be the initial recipient of any payments under the Act. *See infra* Appendix E p. 33a.

[20] Congress' recent amendment to 31 U.S.C. § 6901(2) (formerly § 1606(c)) expressly adopts the general governmental service definition for units of local government. *See infra* Appendix E p. 32a, and note 28.

purpose units such as school and water districts are *not* units of general government and are ineligible to receive Section One payments directly. 43 C.F.R. § 1881.0-5 (1983).[21] The units of local government are to use the payments they receive under Section One of the Act for *any* governmental purpose, consistent with the varying types of services the local governments provide for federal lands. *See infra* p. 23 and Appendix D p. 16a. Indeed, the legislative history of the Act leaves no doubt that the units of local government were to have absolute discretion in determining how and where to expend Section One funds—in large part due to the inequities of distributions under other statutes directly to *state* governments. *See infra* p. 22 and Appendix D pp. 16a-17a.

However, S.D.C.L. § 5-11-6 disrupts the federal scheme by imposing restrictions on the local government's use of Section One payments. The South Dakota statute provides that all federal payments in lieu of taxes to units of local government in South Dakota are to be distributed in the same manner as normal tax proceeds. This scheme of distribution would result in the direct payment to the School District and other school districts in Lawrence County of sixty percent of the funds that are to be paid to the County under Section One of the Act. Appendix A *infra* p. 2a.

Congress expressly determined that payments were to go to counties and not to state governments, so as to avoid the state governments' control over the distribution of the payments. An examination of Section Four of the Act, 31 U.S.C. § 1604, underscores this determination. That section lists ten statutes which provide for revenue sharing payments to be made to

[21] This determination finds direct support in the legislative history. "The definition of 'unit of local government' assures that counties, cities, towns and townships . . . and other units of local government that have general governmental responsibilities, as opposed to single purpose functions such as school districts and water districts, will be the recipients of these payments." H.R.Rep. No. 1106 at 12; Appendix D *infra* p. 23a; Appendix E *infra* p. 32a.

state[22] and local governments[23] to return a percentage of the revenues derived by the federal government from the operations on certain federal lands. Those payments are generally earmarked for particular purposes and are subtracted out from any Section One payments to be made to the local governments to avoid double payment. 31 U.S.C. § 1602(a). In response to the inequities of those distributions, Congress provided that payments under Section One of the Act would go *directly* to the local governments so the states would not be determining their distribution, nor restricting their use to particular purposes. *See infra* Appendix D pp. 15a-18a.[24] The South Dakota statute seeks to substitute the state's judgment for that of Congress in attempting to impose restrictions on the use of Section One payments, which Congress determined should not be imposed, and by directing payments to entities other than units of local government. The state statute is therefore void under the Supremacy Clause.

3. The Supremacy Clause.

The starting point for Supremacy Clause analysis is well established in the precedent of this Court. There is no question that Congress may, within constitutional limits, preempt state

[22] *See, e.g.*, 16 U.S.C. § 500 (payment of 25% of national forest receipts to states for schools and roads); 30 U.S.C. § 919 (payment of 50% of oil and gas royalties from federal lands to states for expenditures as they direct).

[23] *See, e.g.*, 7 U.S.C. § 1012 (25% of certain farm revenues paid to counties for schools and roads).

[24] The restriction on the use of federal funds in the Section Four statutes was one of the primary reasons for establishing that Section One payments were to be used "for *any* governmental purpose." *See infra* Appendix D p. 16a. Those statutes should be read *in pari materia* with the Act in determining its construction and meaning. 2A Sands, Sutherland *Statutory Construction* § 51.03 (4th Ed. 1973). The restrictions on the use of funds in those statutes support the conclusion that the "*any* governmental purpose" language in the Act meant that *no* restrictions were to be imposed on the use of Section One payments.

authority to legislate in a particular area in express terms. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Further, Congress may implicitly preempt state regulation where "[t]he 'scheme of federal regulation . . . [is] so persuasive as to make reasonable the inference that Congress left no room [for the States] to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. ____, ____, 103 S.Ct. 1713, 1722 (1983), *citing Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, 458 U.S. ____, ____, 102 S.Ct. 3014, 3022 (1982) and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Where Congress has entirely displaced state regulation, state law is preempted and nullified to the extent it conflicts with federal law. *Pacific Gas & Electric Co.*, ____ U.S. at ____, 103 S.Ct. at 1722. "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility," *Id. citing Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id. citing Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *Accord, Fidelity Federal Savings & Loan*, 102 S.Ct. at 3022; *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). A determination of conflict "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict" and "in deciding whether any conflict is present, a court's concern is necessarily with the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted." *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981). Most importantly, the Court must "consider the relationship between [the] state and federal laws as they are

interpreted and applied, *not merely as they are written*." *Jones* v. *Rath Packing Co.*, 430 U.S. at 526 (emphasis supplied). Furthermore, "[t]he purpose of Congress is the ultimate touchstone." *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

First, the South Dakota statute is preempted by the Act because it purports to regulate the federal government's public lands, an area exclusively reserved to Congress by the Property Clause, Article IV, § 3 cl. 2 of the United States Constitution. *See Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21-22 (1952). Under the Act, Congress has determined that units of local government, and not state governments or special districts, are to be compensated directly for the costs associated with the presence of federal lands within their boundaries. 31 U.S.C. § 1601; *see infra* Appendix D p. 19a. This determination is final and state legislation affecting the determination is preempted both by the Act's grant of discretion to the counties to expend funds for *any* governmental purpose[25] and the fact that the Act itself pertains to federal lands, an area of exclusive federal control. *Kleppe* v. *New Mexico*, 426 U.S. at 542-43.

Further, the South Dakota statute requires payments to go directly to school districts. Although the County's *voluntary*

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[25] Congress can constitutionally delegate its decision-making power as to expenditures of these funds to counties consistent with the Property Clause. *See* United States v. Ferry County, 511 F.Supp. 546, 552 (E.D.Wash. 1981). Furthermore, the government can impose terms and conditions upon how its payments to the local governments are to be disbursed. King v. Smith, 392 U.S. 309, 333 n. 34 (1962). Here, Congress determined that units of local government are to expend funds in *their* discretion and "a state is without power by reason of the Supremacy Clause to provide the conditions on which the federal government will effectuate its policies." United States v. Georgia Public Service Commission, 371 U.S. 285, 293 (1963).

distribution of Section One payments to the School District may be consistent with the Act,[26] any attempt to regulate this distribution by *requiring* that payments be made directly to the school district would be, in effect, a requirement that the Section One funds go to an entity other than a unit of local government as defined in the Act[27] and in Interior's regulations.[28] This conflicts directly with the Act's payment plan, notwithstanding the fact that payment to a school district may be deemed a governmental purpose. The state does not

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[26] If the units of local government want to distribute some of the money to school or other special purpose districts, they certainly could as such a distribution would likely qualify as a use for a "governmental purpose." Lawrence County v. State of South Dakota, 513 F.Supp. at 1042; Kendall v. Towns County, 146 Ga.App. 760, 247 S.E.2d 577 (1978).

[27] 31 U.S.C. § 1606(c) does not list school districts as eligible units of local government, and the legislative history expressly excludes them. *See supra* note 21. In this regard, Congress' express inclusion of school districts in Section Three of the Act indicates that the lack of school district specification in Section One means that Section One payments are not to go directly to the school districts. *See infra* p. 25. The rule of statutory construction is that where Congress has employed a term in one place and excluded it in another, it should not be implied where excluded. *See* Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 515 (1963). Further, Congress' recent amendment defines units of local government in much the same manner as Interior's regulations which exclude school districts. *See supra* note 21 and *infra* note 28; Appendix E. p. 32a.

[28] 43 C.F.R. § 1881.0-5. Interior's regulations in this area are entitled to deference and are controlling as to the operation of the statute. Fidelity Federal Savings & Loan Assn., 102 S.Ct. at 3022. Further, Interior's determination that school districts are not units of government so as to be eligible to receive Section One payments is consistent with the Act, as well as the Act's legislative history and has sustained judicial challenge. *See supra* note 21 and Altus Denning School District No. 31 *supra* note 9. Indeed, the correctness of this determination is confirmed by the recent amendment to the Act. *See supra* notes 19 and 20.

retain the authority to compel the county to do what it *could* otherwise do. *Chicago & North Western Transportation Co.*, 450 U.S. at 318. The South Dakota statute conflicts directly then with Congress' scheme for distributing Section One payments and is therefore void under the Supremacy Clause.[29]

There are two district court decisions which hold that a state's tampering with a federal plan for distributing payments is unconstitutional. In *Shepheard* v. *Godwin*, 280 F.Supp. 869 (E.D.Va. 1968), the court struck down a Virginia law which affected Congress' scheme for providing compensation to certain school districts. Congress had sought to provide extra payments to those school districts whose populations were enlarged by federal employees' children but whose revenues had been decreased because of the presence of federal lands. 280 F.Supp. at 871. The federal government determined that supplemental payments should go directly to these school districts, but Virginia law provided that these supplemental payments would be subtracted when determining the amount of the state's payments to the school districts, thereby eliminating the helpful effect of the federal payments. 280 F.Supp. at 872-73. In holding the Virginia law invalid under the Supremacy Clause, the court concluded that "the State formula wrenches from the impacted localities the very benefaction the act was intended to bestow. The State plan must fall as violative of the Supremacy Clause of the Constitution. Our decision rests entirely on the terms, pattern and policy of the act." *Id.* at 874. The court also found that the absence of any restriction upon state action in the statute supported, rather than detracted from, the conclusion that the states could not legislate in the

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[29] *See* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), where this Court struck down a diversion of federal pension benefits pursuant to a state's community property law. Congress had determined that the benefits go to a retiree alone and the state could not reallocate them. *Id.* at 583-84.

area or otherwise tamper with the federal payment scheme (*Id.* at 875)

> . . . as we have already noted, the moneys are paid to the locality and not to the State, and there was no apparent reason to include any restriction upon the State. Moreover, *this omission from P.L. 874 originally, or as reenacted, would seem to imply that no touch, direct or indirect, of the money by the State was even remotely permissible.* (emphasis supplied)[30]

This same conclusion was reached by the court in *Hergenreter* v. *Hayden*, 295 F.Supp. 251 (D.Kan. 1968). There the court struck down a Kansas law which sought to realign similar federal payments (*Id.* at 255):

> Neither of defendants' contentions can be sustained. We think it is clear upon the law and the evidence that the State of Kansas is tampering with the distribution of federal funds contrary to Congressional intent expressly in P.L. 874, and hence is in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2.
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> The admitted purpose of the Kansas legislature, no matter how laudable its motive or, theoretically, how valuable its end in aiding education in federal impact areas, was to

[30] Where a state asserts control over federal activities or obstructs congressional purpose, an authorization of state regulation would be found only where Congress explicitly mandates or clearly and unambiguously authorizes such regulation. Don't Tear It Down v. Pennsylvania Avenue Development Corp., 642 F.2d 527, 536 (D.C.Cir. 1980). Such a mandate or authorization is absent here. Under Congress' recent amendment, state regulation is only authorized to the extent of redistributing payments among units of local government and not determining governmental purposes for which the local governments can use their Section One payments. *See infra* Appendix E p. 36a. Accordingly, the Act does not authorize states to redistribute federal funds in the manner prescribed by S.D.C.L. § 5-11-6.

> substitute state judgment for federal judgment, as reflected in the state and federal statutes considered here. No matter how salutary the state legislation, it must give way under the Supremacy Clause.

The South Dakota statute is in direct conflict with the terms of the Act as it redistributes Section One payments contrary to the federal scheme and substitutes the state's judgment for that of Congress. Accordingly, S.D.C.L. § 5-11-6 is void under the Supremacy Clause.

4. Congressional Purpose.

The South Dakota legislation also frustrates congressional purpose. The legislative history of the Act[31] and statements of the Act's supporters and sponsors[32] make it abundantly clear that when Congress was designating Section One payments to be used by local governments for any governmental purpose, that their discretion was absolute. This would achieve the purpose of providing reimbursement directly to the local governments impacted by the presence of federal tax-exempt lands. (H.R.Rep. No. 1106 at 12, Appendix D *infra* p. 22a):

> . . . [T]he Committee believes that payments under H.R. 9719 should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these lands. *The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purpose.* (emphasis supplied)

State income and sales taxes as well as other revenue sharing provisions which allow some revenues generated on federal lands to go to the states were deemed inadequate to compensate the units of local government which must provide local services for federal lands. Thousands of visitors come each year to some federal lands, yet the income and intangible economic benefits to the local economy "do not usually accrue

[31] *See infra* Appendix D p. 14a.

[32] *See infra* Appendix D p. 23a.

to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands." S.Rep. No. 1262 at 9; Appendix D *infra* p. 16a.

As a further example of Congress' intention to rely exclusively on the local government's discretion in determining the allocation of payments under the Act, Congress recognized that the control states exert under revenue sharing acts often resulted in counties receiving little or no compensation. (S.Rep. No. 1262 at 9; Appendix D *infra* p. 16a):

> Many of the revenue sharing provisions permit the States to make the decisions on how tne funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt

It is clear, then, that Congress intended to provide payments under Section One of the Act to be used by the counties for their particular needs as they saw fit. "These reports and the other evidence cited by this Court clearly establish that Congress intended to provide monies under [31 U.S.C.] § 1601 to the counties for them to use for their particular needs." *Lawrence County* v. *State of South Dakota*, 513 F.Supp. at 1042. At the time the Act was debated and passed, congressmen uniformly recognized that payments under the Act *should* go directly to the units of local government and not be earmarked for specific purposes such as roads or schools so the local governments could use the funds as they determined. Appendix D *infra* pp. 23a-31a.

The absolute discretion vested in the units of local government cannot be compromised by any state interest in treating in lieu payments the same as tax proceeds. Congress' decision to treat federal payments under Section One of the Act differently from tax proceeds is not only a statement of congressional preference expressed in the Act and its legislative history, but quite logical. In finding that the existing revenue sharing provisions were inadequate, Congress noted the different types of costs incurred in supporting activities on federal as opposed to private lands.

> Even in the few instances when a local government's share of the various revenues and fees is sufficient to meet service demands arising from the Federal lands and to approximate the loss of ad valorem tax revenues which would otherwise be generated by those lands, *too many of the revenue sharing provisions restrict the use of funds to only a few governmental services—most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands.* These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.
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> While the Commitee does not discount the fact that some benefits accrue to localities where national parks, monuments and wilderness areas are located, the revenues produced for local community do not match the burdens of providing additional police and fire protection, search and rescue service, medical and hospital facilities, and other governmental responsibilities required in and around these areas because of the influx of visitors.

S.Rep. No. 1262 at 9, 13 (emphasis supplied); Appendix D *infra* pp. 16a, 17a. Counties and other units of local government receiving Section One payments were to have absolute discretion in distributing Section One payments. Congress recognized that the burden of tax-exempt property falls directly on the units of local government which must provide police, fire and other services and therefore the Act provides that the

counties and *not the states* are to determine how Section One payments are to be distributed. The Act's purpose in making these payments to units of local government for their discretionary expenditure would be frustrated by South Dakota's attempt to restrict the use of the payments to one or more particular purposes, and any such attempt is constitutionally void.[33] *See Perez* v. *Campbell*, 402 U.S. 637, 650 (1971); *National City Lines, Inc.* v. *LLC Corp.*, 687 F.2d 1122, 1132 (8th Cir. 1982); *Hergenreter* v. *Hayden*, 295 F.Supp. at 255.

Congress did express special concern for affected school districts and for their compensation under a separate section of the Act. As a supplement to payments under Section One of the Act, Section Three of the Act provides for additional payments to units of local government for lands acquired for national park systems or forest wilderness areas after December 31, 1970. 31 U.S.C. § 1603. Unlike Section One payments, which are not earmarked for any special purpose, nor administered under any guidelines, Section Three payments are to be distributed under guidelines established by the Secretary of the Interior on a proportional basis to counties *and* affected school districts which have incurred losses of real property taxes as a result of the addition of land to the federal park and wilderness systems. *Id.*

These Section Three payments provide supplemental assistance to the units of local government and school districts for five years after the land's acquisition. These payments are designed to alleviate the *immediate* impact of removing land

[33] Congress' recent amendment authorizes states to make limited redistributions of payments under the Act among units of local government. *See supra* note 30 and *infra* Appendix E. This limited authority does not support the complete rewriting of Congress' plan in S.D.C.L. § 5-11-6. Rather, the limited authority in the amendment supports the conclusion that the states had *no* authority to redistribute the payments at all; otherwise the new section would be mere surplusage. United States v. Menasche, 348 U.S. 528, 538-39 (1955); Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978).

from the tax rolls. S.Rep. No. 1262 at 18; Appendix D *infra* p. 18a. *See also* H.R.Rep. No. 1106 at 11; Appendix D *infra* p. 21a. This express provision providing compensation for school districts in Section Three supports the conclusion that Congress did not intend any of the Section One payments to go to the school districts except those the County independently decided to provide. *See supra* note 27.

5. Error Of The South Dakota Supreme Court.

As the foregoing amply demonstrates, the South Dakota legislation is void under the Supremacy Clause because it directly conflicts with the Act and frustrates congressional purpose. The errors committed by the Supreme Court of South Dakota in failing to reach this result are twofold. The court first failed to analyze any of the Act's legislative history. Second, the court analyzed only one sentence of the Act in isolation when it concluded that S.D.C.L. § 5-11-6 was in harmony with the Act. These errors prevented a complete evaluation of congressional purpose which is the touchstone of Supremacy Clause analysis. *See Malone* v. *White Motor Corp.*, 435 U.S. at 504.[34]

In ignoring the Act's legislative history, the South Dakota Supreme Court misused the well worn maxim that where legislation is purportedly clear and unambiguous on its face, there need be no resort to extrinsic aids to determine its meaning or purpose. In refusing to examine the legislative history—or even the other provisions of the Act—the court below reasoned (Appendix A *infra* p. 3a):

> [The County] would have us launch this inquiry with an examination of the legislative history of the Act. However, resort to legislative history is justified only when

[34] The South Dakota Supreme Court did not challenge the County's argument that federal law preempted conflicting state law under the Supremacy Clause. Appendix A *infra* p. 2a. The court simply failed to perform the required analysis to determine whether state law did conflict with the terms and purposes of the Act.

legislation is ambiguous or its literal meaning is absurd or unreasonable. Absent these circumstances we must give legislation its plain meaning. We cannot amend it to produce or avoid a particular result . . . In our view, the scriveners of 31 U.S.C. § 1601, wrote in plain, clear and rational language. We therefore need not look to legislative history. By the plain words of 31 U.S.C. § 1601, the federal money distributed to [the County] "may be used by such unit for any governmental purpose." S.D.C.L. § 5-11-6 requires distribution of these federal payments as taxes are distributed and thus school districts are recipients. Support of school districts is a governmental purpose.

* * *

[The County] receive[s] federal money in lieu of taxes that the entitlement land would be subject to if it were not owned by the federal government. One such tax is a school tax. We find no conflict between the two laws. If Congress intended to prohibit § 1601 funds from going to school districts, it could have done so by writing that prohibition into § 1601. However the only restriction placed on these funds is that they be used for a governmental purpose, which it is under S.D.C.L. § 5-11-6.

It is evident that the court was using the "plain meaning rule" to foreclose any analysis of legislative history which contradicts its conclusion.[35] The legislative history clearly demonstrates that the Act's overriding purpose was to provide local governments with funds to be used, as they determined, to pay for the unique costs associated with providing services for federal lands within their boundaries. *See infra* Appendix D pp. 17a-21a. The Act's legislative history and the express

[35] Actually, the court appears to be searching for a justification for its conclusion because it did not even analyze the "plain meaning" of the Act correctly. It is "plain" that South Dakota's attempt at defining a governmental purpose under the Act is inconsistent both with the word *any* as well as the grant of the funds to *local* as opposed to *state* governments. The plain meaning of the Act therefore supports a finding that the state statute conflicts with the Act.

congressional purposes stated therein cannot be excluded merely because language "on its face" may be clear. "Even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1979). *See also Watt* v. *Alaska*, 451 U.S. 259, 266 (1981) (plain meaning rule does not preclude consideration of persuasive evidence if it exists). Further, as this Court concluded in *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976), *citing United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-44 (1940):

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "

See also Dickerson v. *New Banner Institute, Inc.*, ___ U.S. ___, ___, 103 S.Ct. 986, 994 (1983) ("as in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes congress sought to serve"); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 ("a Supremacy Clause inquiry requires [the court] to consider the relationship between state and federal laws as they are interpreted and applied not merely as they are written."); *Rocky Mountain Oil & Gas Assn.* v. *Watt*, 696 F.2d 734, 745 (10th Cir. 1982) ("congressional purpose and intent are best divined by examining the statute's legislative history). *See generally* Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Col.L.Rev. 1299 (1975).

Therefore, the South Dakota Supreme Court's attempt to ascertain the meaning of the Act on its face was an incomplete inquiry; this is made evident by the fact that statutory purpose is more clearly determined from the accompanying legislative

history, than from a narrow reading of the Act. *See Watt* v. *Alaska*, 451 U.S. at 266. Indeed, employing the Act's legislative history, the dissent concluded that S.D.C.L. § 5-11-6 *did* conflict with federal law. Quoting S.Rep. No. 1262 at 9 (*see* Appendix D *infra* p. 16a), Justice Dunn reasoned (Appendix A *infra* p. 6a):

> This statement makes it abundantly clear that *Congress was directing the states to keep their noses out of the manner in which a county would distribute these funds.* I believe Congress intended the county be vested with total discretion in distributing section 1601 funds. While the county may choose to distribute part of the section 1601 funds to the school district, *see Kendall* v. *Towns County*, 146 Ga.App. 760, 247 S.E.2d 577 (1978), I do not believe the county can be forced to do so as contemplated by S.D.C.L. § 5-11-6. *By the passage of S.D.C.L. § 5-11-6, South Dakota was undermining the very intent and purpose of the Act by earmarking sixty percent of the funds for school districts.*

The majority opinion below relied heavily upon a finding that because expenditures on school districts is a "governmental purpose" that South Dakota could independently determine that the County must spend sixty percent of its Section One receipts on school districts. Appendix A *infra* p. 3a. While correct that expenditures on school districts may be one of many legitimate governmental purposes, *see supra* note 26, the court below should have analyzed the language "any governmental purpose" in the context of the whole Act, its purposes and the circumstances under which the language was employed, rather than in isolation. *See Kokoskza* v. *Belford*, 417 U.S. 642, 650 (1974); *District of Columbia* v. *Carter*, 409 U.S. 418, 420 (1973). A complete analysis would have shown that the state had no authority to determine for the County which of "any governmental purposes" were to be served by the Act's payments. *See also supra* note 35. South Dakota's tampering with the federal scheme and restriction on the County's discretion, whether or not the result the state statute achieves would have otherwise been permissible, is irrelevant. *See Jones* v. *Rath Packing Co.*, 430 U.S. at 540. It would be

inconsistent with federal policy if the state retained the power to determine whether the County could do what the Act authorizes the County to determine for itself. *See Chicago & North Western Transportation Co.*, 450 U.S. at 318. Accordingly, the South Dakota Supreme Court committed clear error in upholding the state's power to alter the federal regulatory scheme and its decision should be reversed.

6. Substantiality Of The Federal Interests.

The strong federal interest in distributing payments in lieu of taxes to units of local government is clearly demonstrated in the Act and in the Act's legislative history. The states could, however, unless the decision below is reversed, misdirect some or even all of every local government's payments contrary to express congressional purpose. For the period 1979-81, the County received approximately $400,000 under Section One of the Act. Appendix A *infra* p. 1a. In that same time period, all of the counties in South Dakota received $5.6 million under Section One of the Act. U.S. Dept. of Interior, *Payments In Lieu Of Taxes* fiscal years 1979, 1980 and 1981. Consistent with the decision below, South Dakota could divert all of these funds to "governmental" purposes the *state* determines are appropriate and in effect defeat the entire federal scheme. For example, South Dakota could legislate that 100 percent of the County's Section One payments would go to school districts. Because that forced expenditure would be for "a governmental purpose," the state scheme would stand on the authority of the decision below. The decision of the South Dakota Supreme Court could also be used as authority for other states to legislatively misdirect all or part of their local governments' payments under the Act. *See, e.g.*, Ark.Stat. Ann. § 80-726, *supra* note 9. This result is magnified by the total amount of federal payments under the Act which approaches $100 million annually. U.S. Dept. of Interior, *Payments In Lieu Of Taxes*, fiscal year 1982.

It is clear that the County was to determine free of state influence where to expend payments it received under the Act.

Congress had determined that there should be no restrictions on the County's use of the funds and the state cannot substitute its judgment as to the expenditure of these funds for that of Congress. *Hergenreter* v. *Hayden*, 295 F.Supp. at 255. In fact, the Act was designed in large part to ensure that Section One payments reach the units of local government for their expenditure because the states were not directing enough funds to the local governments under other statutes. The South Dakota statute would defeat the intended effect of the Act by unconstitutionally supplanting the scheme created by Congress and compromising congressional policy. *See Florida Lime & Avocado Growers*, 373 U.S. at 271 (White, J., dissenting). This complete reworking of a considered and express congressional plan should not stand.

CONCLUSION

The federal interests at stake are substantial. The South Dakota court's conclusion stands as the authority for the diversion and misdirection of more than $100 million annually from local governments to the objects of a state's largesse. Substantial federal interests have been sacrificed to uphold a state statute which not only touches upon an area of exclusive federal regulation, but which frustrates explicit congressional purpose. The South Dakota Supreme Court's failure to properly analyze the County's Supremacy Clause challenge and to void the South Dakota statute is a judgment which this court should summarily reverse. In the alternative, because of the importance of the Act in carrying out a salient federal policy, this Court should note probable jurisdiction and set the matter for full briefing and oral argument. *See American Commercial Lines, Inc.* v. *Louisville & Nashville R. Co.*, 392 U.S. 571, 574 (1968).

Respectfully submitted,

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